In the Supreme Court of Pennsylvania, Philadelphia, March, 1855.

BALLBECK *vs.* DONALDSON.

1. A trust in favor of the grantor cannot be inferred in a conveyance absolute upon its face, from proof that he continued to retain possession of the property, and that no money was paid by the grantee.

2. Whether an express agreement, resting in parol, that the grantee should hold the title in trust for the grantor, can be enforced *quære?*

[Error to the District Court for the City and County of Philadelphia.]

The facts of this case sufficiently appear in the opinion of the court.

A. C. & J. E. Gowen, for the plaintiffs in error, contended,

1. That oral evidence of the absence of a consideration is inadmissible to defeat the operation of an absolute deed.

2. That the parol creation of a trust estate is interdicted by the Pennsylvania statute of frauds, the decision in *Murphy* vs. *Hubert*, 7 Barr, 420, to the contrary notwithstanding.

G. M. Wharton, contra.

The opinion of the court was delivered by

KNOX, J.—This was an action of ejectment brought by David Ballbeck against Hugh Donaldson and Joseph Vardin, to recover the possession of certain real estate in the City of Philadelphia.

The plaintiff's case depends upon the validity of a deed from Donaldson, the defendant, to Mrs. Eliza Braceland, bearing date November 4th, A. D. 1843, and recorded on the 16th day of January, 1849. The heir at law of Mrs. Braceland was the wife of the plaintiff, who was dead, leaving a will by which all her real estate was devised to her husband.

The defendant Donaldson denied that the plaintiff's mother-in-law was *the* Mrs. Eliza Braceland to whom he had made the conveyance in November, 1843; and he also asserted, that, in case her identity was found by the jury, the evidence showed that the conveyance to Mrs. Braceland was in trust for the benefit of the grantor.

Considerable evidence was given on both sides upon the question of identity which was fairly submitted to the jury, and of which no complaint is now made.

In addition it was shown by the defendant that the original deed was in his possession upon the trial, and that no possession of the disputed property had been taken by Mrs. Braceland or those claiming under her, but that it had been occupied and used as his own exclusively from the date of the deed to the day of the trial, and likewise, that Mrs. Braceland who lived until March, 1846, was poor, having an income of about two hundred and fifty dollars per annum. A conveyance was also in evidence from *a* Mrs. Braceland to William Caldwell, dated 14th November, 1849, and from Caldwell to the defendant Donaldson by two deeds dated one in Nov. 1850, and one in Dec. 1851.

The learned judge of the District Court charged the jury, "that if they should determine the question of identity in favor of the plaintiff, there was still another point taken by the defendant's counsel which they were to consider, and that was whether there was not a trust in favor of the grantor or defendant Donaldson in the deed to Eliza Braceland."

In this there was error. If the question of identity was found in favor of the plaintiff, the next question that arose under the evidence was whether or not the conveyance was ever perfected by a delivery of the deed. This was a question of fact for the jury. The recording of the deed was *prima facie* evidence of its delivery, and the burthen of proof was upon the defendant to satisfy the jury that it had never been delivered, and for this purpose it was legitimate to show the possession of the title papers and the occupancy of the property.

The condition in life of *the* Mrs. Eliza Braceland under whom the plaintiff claimed, and her residence were proper subjects of inquiry upon the question of identity, but not upon that of delivery. The consideration recited in the deed, and which was acknowledged by it to have been received by the grantor from the grantee was six thousand eight hundred dollars. Now the presumption was, in the absence of explanatory evidence, that this was a purchase, and

not a gift; and if the plaintiff's mother-in-law was in reduced circumstances, the probability that she was the grantee would be lessened, but if her identity was once established, the effect of the decree could not be impaired by the existence of her poverty. For when delivered, it would pass the title as between the parties to it, whether founded upon a valuable consideration or not. A deed absolute upon its face cannot be converted into a deed of trust for the benefit of the grantor by proof that no money was paid by the grantee, and that the grantor had remained in possession for three years after the date of the conveyance. It is unnecessary to determine, whether an express agreement, resting in parol, made at the time of the delivery of the deed, that the grantee should hold the title for the benefit of the grantor can be enforced, as the point is not raised in the case under consideration. All that we now decide is that such an agreement cannot be inferred from the poverty of the grantee, the continuation of the grantor in possession, and the production by him at the trial of the original deed of conveyance.

Neither the acts or declarations of Mr. Donaldson, nor the statement of Mrs. Eliza Braceland in reference to her papers were evidence, as the wife was not shown to have been the husband's agent, and Mrs. Braceland did not speak to the defendant or in his presence.

If the case is presented upon another trial as it appears upon our paper books, its result will depend upon two questions, viz: 1st. Was the plaintiff's mother-in-law the person named in the deed from Donaldson? 2d. Was the deed delivered? If these questions are found for the plaintiff he is entitled to a verdict, otherwise he has no case.

Judgment reversed, and *venire de novo* awarded.